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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1289~~ 120

CHARLES DEL MONICO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, Charles Del Monico, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 27, 1966, affirming Petitioner's conviction on two counts, one of violating 18 U.S.C. § 1952 and the other of conspiring so to do.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is printed in the Appendix to this Petition, App. 1a-24a. The Court's Opinion is officially reported at 355 F. 2d 999.

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 1966, App. 24a. A timely petition for rehearing was denied on March 10, 1966, App. 25a. On March 29, 1966, Mr. Justice Douglas entered an order extending the time within which to file this Petition to and including May 7, 1966, App. 26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1952 is constitutional.

2. If 18 U.S.C. § 1952 is constitutional, whether the statute may be violated by a single isolated act or whether the conduct proscribed thereby is only a continuous course of conduct.

3. Whether the petitioner was denied a fair trial in a situation in which, during the trial, widespread newspaper, radio and television coverage accusing a co-defendant of being a member of the Mafia, Cosa Nostra, syndicate or underworld came to the attention of the jury room.

4. Whether it is permissible for the prosecution to call an unindicted co-conspirator, whose testimony it then believed to be false, as a Government witness and seek to impeach such testimony in closing argument.

STATUTE INVOLVED

Title 18, United States Code, Section 1952 reads as follows:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal exercise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

STATEMENT

Viewing the facts most favorably to the government, the evidence showed that in April, 1963, the petitioner and a co-defendant, John Marshall (who is filing a separate petition for writ of certiorari), drove from Las Vegas to Palm Springs, California. (RT 451, 538, 623) In late April, while still in Palm Springs, Marshall and Del Monico made reservations to return to Las Vegas on May 1, 1963. (RT 693) On April 29, 1963, Marshall telephoned Ray Ryan, the owner of a hotel in Palm Springs, and arranged a meeting. (RT

915) Following the meeting Marshall and Del Monico drove Ryan to the airport. (RT 923)

It was alleged that Nicholas ("Nick the Greek") Dandolas thought Ryan had cheated him out of a substantial amount of money in a card game and had hired Marshall and Del Monico to collect this money for him. Ryan testified that during the ride to the airport, Del Monico, the driver, struck him on the chest, doing no injury, but with the remark that this was simply to show they meant business. (RT 923) Marshall and Del Monico dropped Ryan at the airport and Ryan flew to Las Vegas. Later that evening, Marshall and Del Monico themselves flew to Las Vegas. (RT 771)

The next day, Marshall met Ryan in Ryan's room at the Desert Inn in Las Vegas. (RT 930) According to Ryan's testimony, Marshall demanded money from him and told him that that "syndicate" had protected him in the past. Marshall then suggested that they leave the room and, as they did, Ryan ran down the hall where he saw Del Monico and Dandolas. He later called the Federal Bureau of Investigation and this prosecution ensued. (RT 932 et seq.)

During the trial, newspapers, radio and television carried a series of articles prejudicial to the petitioner's co-defendant, John Marshall. (Ex. MM-1-MM-20). These articles were read, heard or seen by a number of the jurors. (RT 2007 et seq). The stories concerned the gangland bombing of a witness in a case in Chicago and went on to state that one of the co-defendants in that case was presently on trial in Los Angeles in the case from which this Petition is filed. The stories made repeated references to "Cosa Nostra", the syndi-

cate, the Mafia and described petitioner's co-defendant as "reputedly one of the rising members of the Chicago crime syndicate". At least six of the members of the jury read or saw some of the publicity, and one of them stated that it had been discussed in the jury room. Appropriate motions for a mistrial were made and, after a voir dire examination of the jurors, denied.

Del Monico was convicted, under Count Three of the indictment, of violating 18 U.S.C. § 1952, and under, Count One of the indictment, of conspiring so to do. He was sentenced to two five-year prison terms to be served concurrently. His co-defendant, John Marshall, was convicted of the same two counts and was sentenced to two five-year terms to be served consecutively.

REASONS FOR GRANTING THE WRIT

1. Although asked to do so on several occasions, this Court has never passed upon the constitutionality of 18 U.S.C. § 1952, a statute passed in 1961 as part of then Attorney General Kennedy's program to curb organized crime. In fact, however, what the statute really attempts to do is to enforce the criminal laws of the several states. The constitutional powers which Congress has under the commerce clause, although they may be broad, may not be so stretched as to infringe upon these powers traditionally reserved to the states. *Knapp* v. *Schweitzer,* 357 U.S. 371. Thus, in *Linder* v. *United States,* 268 U.S. 5, in which this Court invalidated legislation upon a finding that the government was, in fact, regulating the practice of medicine within the several states, the Court stated:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal gov-

> ernment. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced. *M'Culloch* v. *Maryland,* 4 Wheat. 316, 423"

Linder was recently cited with approval in *Cloverleaf Butter* v. *Patterson,* 315 U.S. 148, and in *United States* v. *Five Gambling Devices,* 346 U.S. 441. The basic rule is as stated in *Knapp* v. *Schweitzer,* 357 U.S. 371, 375, in which this Court stated:

> "It is relevant to remand that our Constitution is one of particular powers given to the National Government with the powers not so delegated reserved to the States or, in the case of limitations upon both governments, to the people. Except insofar as penal remedies may be provided by Congress under the explicit authority to 'make all Laws which shall be necessary and proper for carrying into Execution' the other powers granted by Art. 1, 8, *the bulk of authority to legislate on which may be compendiously described as criminal justice,* which in other nations belongs to the central government, *is under our system the responsibility of the individual States."* (Emphasis supplied)

The statute in this case does precisely what *Knapp* v. *Schweitzer* says the Congress cannot do, i.e., invade the states' rights to legislate on criminal justice within their borders. This is a point which has been raised repeatedly in prosecutions under this section and will presumably be continued to be raised until this Court definitely resolves the question.

2. This question becomes of even greater significance when the evidence reveals, not a continuous course of conduct which could be said to violate the statute, but a single unlawful act. No evidence was offered at the trial that the petitioner, or his co-defendant, were engaged in the type of activity herein described as a business. The petitioner's contention that it is only a business or a continuous course of conduct which is proscribed by the statute fell upon deaf ears in both the trial court and the Court of Appeals. App. 4a. Yet the power of Congress so to legislate can more easily be sustained where a continuous course of conduct is proscribed.

United States v. *Teemer,* 214 F. Supp. 952, 958, appeared to read the statute in that manner. The Court of Appeals, in reliance only upon the language of the statute itself, App. 4a, held that the course of conduct argument, while applicable to Section (b)(1) of the statute, was inapplicable to Section (b)(2) by which a single offense was proscribed. The legislative history of the statute, however, recourse to which was held necessary in *United States* v. *Bergland,* 318 F. 2d 159, 161, and to which the Court of Appeals in this case did not address itself, suggests that it was the course of conduct which the entire Section 1952 intended to reach. The structure and objective of the whole of Section 1952 was set out by then Attorney General Kennedy in his opening statement to the Senate Committee:

> "Mr. Chairman, we have one more bill, S. 1653, which is perhaps the most controversial and certainly one of the most important. We are seeking to take effective action against the racketeer

who conducts an unlawful business, but lives far from the scene in comfort and safety, as well as against other hoodlums.

"Let me say from the outset that we do not seek or intend to impede the travel of anyone *except person engaged in illegal businesses* as spelled out in the bill. We specifically have outlined the illicit operations we seek to curtail as those involving gambling, liquor, narcotics, prostitution businesses or extortion or bribery in violation of State or Federal law.

"The target clearly is organized crime. The travel that would be banned is travel 'in furtherance of a business enterprise' which involves gambling, liquor, narcotics, and prostitution offenses or extortion or bribery. Obviously, *we are not trying to curtail the sporadic, casual involvement in these offenses,* but rather a continuous course of conduct sufficient for it to be termed a business enterprise." Senate Hearings, pp. 15-16 (Emphasis supplied)

Similarly, when Assistant Attorney General Herbert J. Miller came before the Senate Committee and was asked by Senator Kefauver why "unlawful activities" were given limited definitions, he replied:

"The reason for that is, Senator, that we were attempting to limit the scope of this statute to *certain types of business* that we know are allied with organized crime." Senate Hearings, p. 107. (Emphasis supplied)

The Senate Committee was so impressed with this presentation that it incorporated in full the opening paragraphs of Attorney General Kennedy's statement quoted above as the Committee's own statement of the purpose and objective of the bill. S. Rep. No. 644, p. 3.

On the floor of the Senate prior to passage, Senator Eastland presented the Committee report with the following statement:

> "S. 1653 is intended to disrupt the interstate operation of these criminal organizations by making it impossible for organized gambling and other illegal activities to operate on an interstate scale beyond the reach of local enforcement agencies . . . .
>
> The term 'unlawful activity' is defined in the bill as 'any business enterprise' involving illegal gambling, liquor, narcotics offense or extortion or bribery. *The use of the term 'business enterprise' requires that the activity be a continuous course of conduct.*" 107 Cong. Rec. 13943. (Emphasis suppiled)

In the House, the progress of the bill was identical. In his opening statement to the House Committee, Mr. Miller stated the overall objective of the bill to be as follows:

> "Moreover, the term 'unlawful activity' is defined to mean 'any business enterprise' involving illegal gambling, liquor, narcotics, or prostitution offenses, or illegal extortion or bribery. *The use of the term 'business enterprise' limits the application of this section to a continuous and organized course of conduct in these activities,* and therefore, exempts casual or occasional travel which is not directly related to such a 'business enterprise.'" (Emphasis supplied)

In its written report to the House, the Committee paraphrased this language almost exactly:

> "The use of the term 'business enterprise' requires that the activity be a continuous course of conduct. *Thus, individual or isolated violations would not*

> *come within the scope of this bill* since they do not constitute a continuous course of conduct so as to be a business enterprise." (Emphasis supplied)

Finally during the House debate on the bill, Congressman Harris introduced a letter from Attorney General Kennedy in answer to certain questions which concerned him as to the intended coverage of the bill. The letter was intended to be a part of the legislative history. The opening statement of Attorney General Kennedy's letter stated:

> "The type of offenses which pose such a great threat to this country due to the involvement of organized crime are *those offenses which are committed regularly and as a continuous course of conduct.*" 107 Cong. Rec. 16541. (Emphasis supplied)

Petitioner submits that the legislative history of the bill shows that the entire statute, not just subsection (b)(1) of section 1952, was aimed at a continuous course of conduct.

3. This case presents, in most graphic focus, a shocking instance of prejudicial newspaper publicity coming to the attention of the jury. During the course of the trial, a government witness in a different case in Chicago in which the petitioner's co-defendant, John Marshall, was one of many defendants, was critically injured when a bomb exploded in his automobile. The local Los Angeles newspapers carried the story in glaring headlines and photographs. The stories contained such phrases as "Gangland Revenge—Informer Bombed" (Ex. MM-2); "Cosa Nostra" the syndicate has struck again", "Chicago Officials Say Tonight There Is a Link Between a Gangland Bomb and the

Windy City Today and a Man in Los Angeles" (Ex. MM-10). The stories went on to advise that the victim had informed on "Marshall Caifano, reputedly one of the rising Lords of the Chicago Crime Syndicate . . . currently in Los Angeles standing trial under the name of Johnny Marshall" (Ex. MM-10); "The Marshall Caifano referred to is on trial under the alias of Johnny Marshall here in Los Angeles. He is reputedly one of the rising members of the Chicago Crime Syndicate" (Ex. MM-10). At least six members of the jury had this information come to their attention. (RT 207, et seq) Under the clear holding of *Marshall* v. *United States,* 360 U.S. 310, the defendant Marshall was entitled either to a mistrial in the trial court or to reversal in the Court of Appeals. *United States* v. *Accardo,* 298 F. 2d 133. Particularly is this so in a situation in which the entire prosecution had to do with gangland enforcement and syndicate threats. And, under *Estes* v. *Texas,* 381 U.S. 532 and *Rideau* v. *Louisiana,* 373 U.S. 723, the Court of Appeals must have erred in imposing a test of prejudice. App. 13a. In view of the petitioner's connection with Marshall in this case and since "a finding of guilt [of Del Monico] was so dependent upon the connection between the two [Del Monico and Marshall]" the collateral information prejudicial to Marshall could not have been harmless to petitioner. *Holmes* v. *United States,* 284 F. 2d 716, 719.

4. The prosecution called unindicted co-conspirator, Nicholas Dandolas, as a government witness and, in closing argument, made the following representation:

> "What did he go to Las Vegas for? He said the day following he had a doctor's appointment in Los Angeles. He said he went over there to do

something or to get some clothing. Examine his trip as to what he did in Las Vegas.

"He got this telephone call before he went. He went over there around 9:00 in the morning. He got to the Thunderbird where he customarily stayed somewhere around 10:30. He says he got a telephone call from Ray Ryan just saying, 'This is Ray Ryan. Come on over to the Desert Inn.'

"He went over to the Desert Inn, he got tired, he looked around, he saw John Drew, he momentarily saw Ray Ryan, and he saw T. W. Richardson. He didn't see anybody else. He did not see Mr. Del Monico there. He did not see Mr. Marshall there.

"He sat around, he got tired, he went back to his room, stayed in his room for the rest of the afternoon, took a treatment, paged the Desert Inn for Mr. Ryan around 4:00 o'clock, left, stopped at the Dunes, went to the airport, didn't contact anybody about picking him up, and came back to Los Angeles. That was his trip."

After so doing, the prosecution said (RT 2378):

"I submit that his trip is not true, nor his testimony about his trip true. . . ."

And again, at RT 2382: "Let's continue to look at Mr. Dandolas' testimony about that trip over in Las Vegas." And at RT 2384: "I suggest that he was not telling the truth when he testified that he didn't see Mr. Del Monico there on that day." And at RT 2385 and 2412, the prosecution continued to ask the jury to disbelieve the testimony of its own witness, Dandolas. The prosecution's purpose in calling Dandolas was to

secure a link between Marshall and Del Monico on the one hand, and a third co-defendant, one Smiley, on the other. The District Court directed a verdict for Smiley and Dandolas gave no significant evidence against either Del Monico or Marshall. From pre-trial statements the government knew he would give none. The fact that he gave none is perhaps best indicated by the fact that there was no cross-examination. This impeachment of Dandolas, once Smiley was out of the case, was nothing more than a calculated effort on the part of the prosecutor to bolster Ray Ryan's image by suggesting that Dandolas, the only unindicted witness to contradict Ryan, was lying and, since Dandolas was known as a co-conspirator, to hang an albatross around the necks of the remaining defendants. The Court of Appeals' treatment of the Dandolas testimony is at odds with the treatment of similar testimony by the Court of Appeals for the Fifth Circuit in *Fontaine* v. *Patterson,* 305 F. 2d 124, 130, and with the Ninth Circuit's own case of *Bateman* v. *United States,* 212 F. 2d 61, 64. These cases are neither cited nor distinguished in the Court's opinion although the court below did recognize the narrow line which prosecutor's must walk in presenting all material evidence while avoiding possibly perjured testimony. The petitioner submits that in this instance the prosecutor crossed that line.

5. Co-defendant John Marshall is filing a separate Petition for Writ of Certiorari which, in addition to raising the points raised on this Petition, seeks to have this Court review the case for additional reasons. This petitioner respectfully asks leave to incorporate those additional questions raised by co-defendant Marshall.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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May 1966